

# NEPA & CWA Section 404 Analyses for Mining Proposals

<http://www.mvp.usace.army.mil/regulatory>

U.S. Army Corps of Engineers

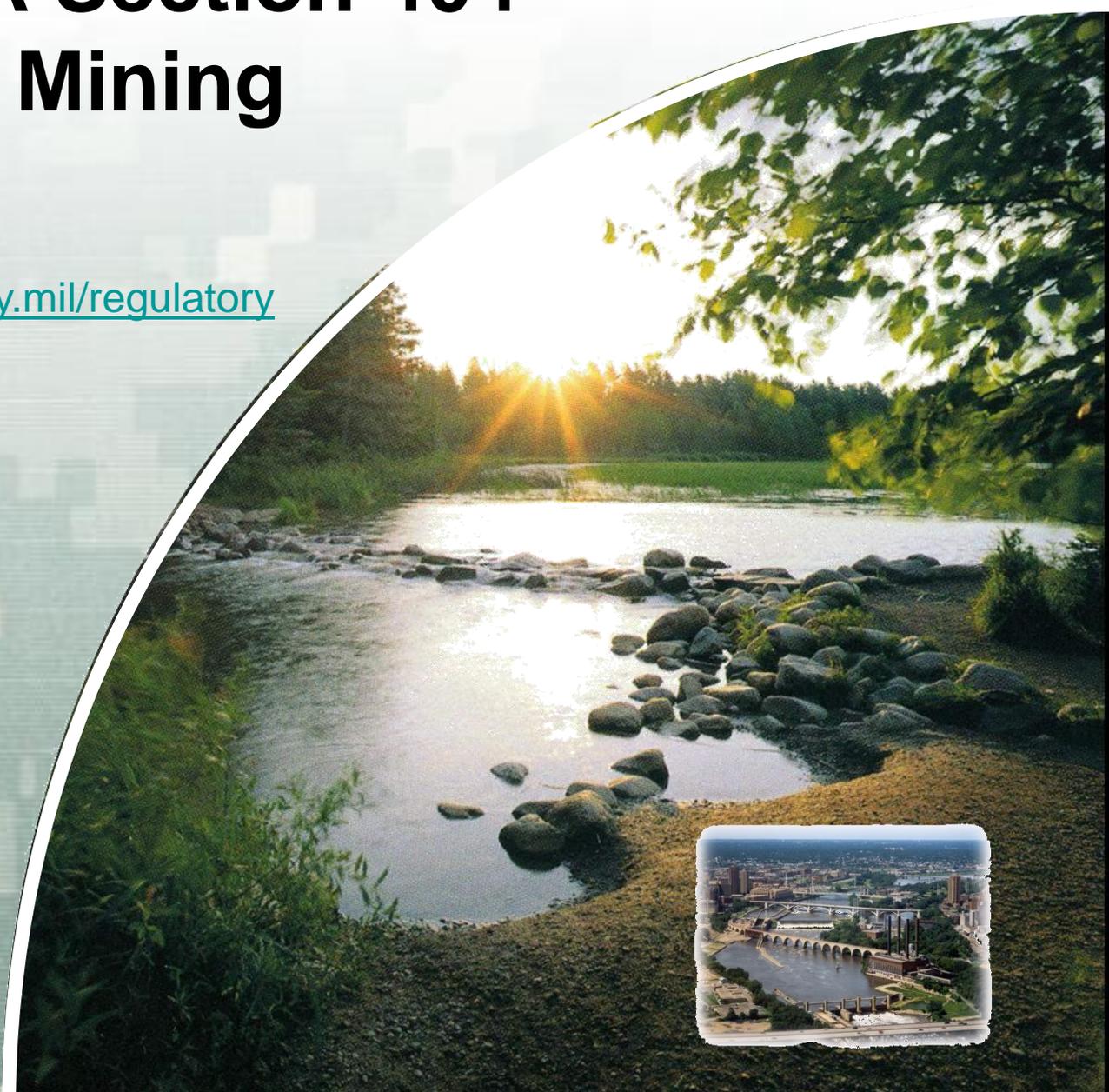
Regulatory Branch

St. Paul District

September 2011



US Army Corps of Engineers  
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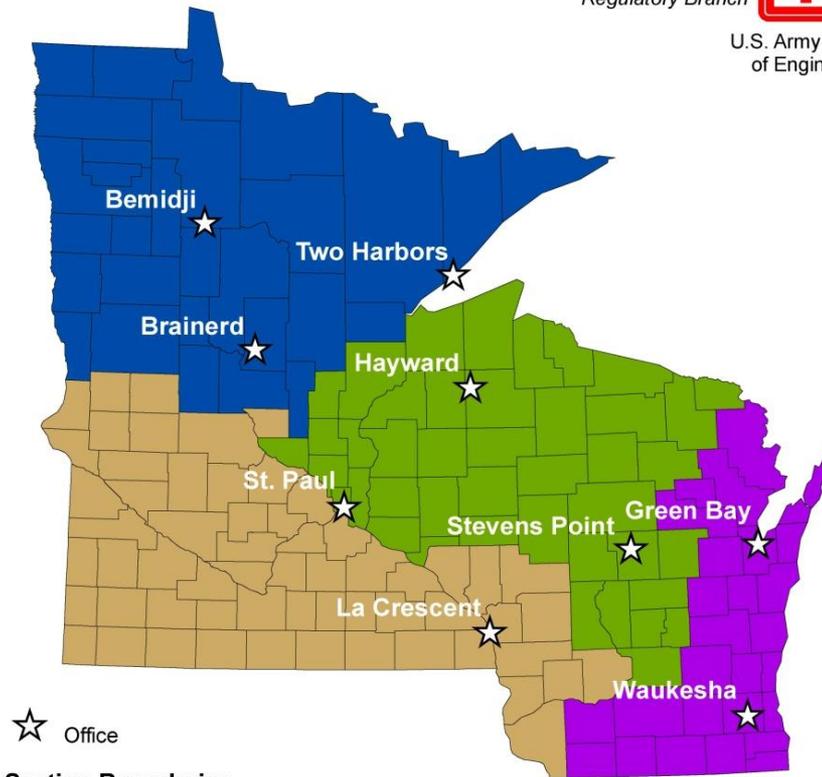


# St. Paul District Regulatory Section Boundaries

St. Paul District  
Regulatory Branch



U.S. Army Corps  
of Engineers



☆ Office

### Section Boundaries

- Northwest Section, Chief - Kelly Urbanek
- Northeast Section, Chief - Jeff Olson
- Southeast Section, Chief - Todd Vesperman
- Southwest Section, Chief - Marita Valencia



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# Authorities

- Clean Water Act Section 404 (CWA Section 404)
  - Corps permit required for discharges of dredged or fill material into "waters of the U.S." (waters of the U.S. frequently include wetlands, rivers, lakes and streams)
  - A case-by-case determination is required but, as a practical matter, the majority of the water bodies and wetlands in Wisconsin are waters of the U.S.
- Rivers and Harbors Act Section 10 (Section 10)
  - Corps permit required to do any work in, over or under a Navigable Water of the U.S. (navigable waters)
  - The Corps website contains a list of waters that have been determined to be navigable waters:  
<http://www.mvp.usace.army.mil/docs/regulatory/navigable%20waters%20wi.pdf>



# Components of Permit Evaluation

- **National Environmental Policy Act**
  - CEQ regulations, 40 CFR 1500 and Corps regulations, 33 CFR 325 Appendix B govern the NEPA process for permit evaluations.
  - Analysis of entire proposal, beyond Corps jurisdiction, is necessary in cases where the environmental consequences of the larger project are essentially products of the Corps permit action.
  - Corps guidance requires use of 3<sup>rd</sup> party contractor to prepare an EIS.
  - Must use joint federal/state EIS process to fullest extent possible.
- **Section 404(b)(1) Guidelines (40 CFR 230)**
  - Corps may only authorize the least environmentally damaging practicable alternative (LEDPA).
- **Public Interest Review (33 CFR 320.4(a))**
  - An evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.



# Coordination during the Permit Evaluation

- Includes resource agencies & Tribal consultation
- Public comment period
- National Historic Preservation Act
  - NHPA Section 106 and 33 CFR 325 Appendix C govern the process for determining the effects of undertakings on historic properties
- Endangered Species Act
  - ESA Section 7(a)(2) requires Federal agencies to insure that any action it authorizes, funds, or carries out, is not likely to jeopardize the continued existence of any Federally listed species or result in the destruction or adverse modification of designated critical habitat
- Section 401 of the Clean Water Act
  - Certification by 401 agency with jurisdiction at **at the location of the regulated discharge** that the discharge into waters of U.S. will not violate water quality standards
    - Certification may granted, waived or denied
  - Downstream 401 authorities?
- Coastal Zone Management Act
  - Consistency determination by the Wisconsin Coastal Management Program or State of Minnesota - May be granted waived or denied.
  - Required for 19 counties adjacent to Lake Superior or Lake Michigan



# Components of Permit Evaluation (cont.)

- Executive Order 13175, Consultation and Coordination with Indian Tribal Governments
- Tribal Policy Principles
  - Acknowledge Tribal sovereignty
  - Meet the Trust responsibility;
  - Honor the government-to-government relationship;
  - Engage in pre-decisional consultation;
  - Self-reliance, capacity building, growth;
  - Protect natural and cultural resources when possible
- Executive Order 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.



# Roles of NEPA Compared to Permit Evaluation

- NEPA
  - Discloses and compares impacts of alternatives
  - Informs decision maker- the content is used to support an agency action
  - Is procedural rather than decisional
- Corps Public Interest review including 404(b)(1) guidelines
  - Uses information developed in the NEPA document
  - Weighs and balances benefits and detriments of alternatives
  - Decisional – The project must be the LEDPA or not contrary to the public interest



# Areas of Concurrence - NEPA Analysis and Corps Evaluation

- Purpose and Need
- Identification and selection of Alternatives
- Assure the Least Damaging Practicable Alternative is carried forward
- Design Phase avoidance and minimization



# Major Milestones in Preparation of a Mining EIS

- Defining the project proposal or proposals
- Notice of Intent
- Scoping
- Prepare and Distribute Draft EIS
- Publish Final EIS
- Record of Decision & Agency Action



# T minus 24 – The Beginning

The project as proposed is the foundation for the analysis.

Analyses cannot fix problems, but a modified project might.

Identify challenges and address them early in the process.



# Project Proposer

## Establish Baseline Conditions as Early as Possible

- Bed Rock, Waste rock, Tailings, Overburden
  - Characterize physical and chemical properties and characteristics
- Identify resources in the potential in the impact area:
  - aquatic resources –wetlands, lakes, streams
  - Groundwater, surface water –quality and quantity
  - Endangered Species
  - Historic Properties
  - Tribal
- Develop an operating plan including processing plant, waste rock & tailings management, water balance, closure, mitigation measures.
- Use baseline conditions & predictive models to define and refine project so that it is likely permittable.



# Corps as a Lead Agency

- Identify other agencies & Native American Tribes that should be involved.
- Identify potential co-lead and co-operating agencies.
- Initiate consultation with tribes that may be affected.
- Is state doing a EIS, should it be a joint State-Federal EIS?
- Invitations to be co-lead or cooperating agency:
  - Letter of Invitation vs. MOU
  - Purpose?
  - Jurisdiction by law or special expertise
  - Impacts to reservation
  - Delineates roles and responsibilities
- Lead agency responsibilities -> Management Plan



# Notice of Intent

- Prepare a notice of intent to prepare an EIS for publication in the Federal Register.
- General description of the project. Who, what, where, alternatives being considered, etc.



# Scoping

- Prepare a draft scoping document for public review. Issue Public notice with 30 day comment period.
- Conduct public scoping meeting during comment period. Advertise meeting via public notice.
- Purpose of scoping is to identify issues to be evaluated in the EIS.
- Prepare final scoping document.
- Scoping does not end until DEIS is published.



# From Scoping to Completion of DEIS

- Select 3<sup>rd</sup> party contractor
- Corps obtains needed data from applicant
- Seek stakeholder input on specific issues
  - Tribes, SHPO, USFWS, 402 NPDES agency, etc
  - Team reviews
  - Summary memos
- 3<sup>rd</sup> party contractor prepares draft DEIS chapters
- At least Lead Agencies review draft chapters
  - Recommend co-operating agencies review select sections
- Lead & cooperating agencies review preliminary DEIS
- Final DEIS prepared



# Release of DEIS

- Public Release of DEIS
  - Notice of availability (NOI) published in Federal Register
  - Minimum 45 day review and comment period
  - USACE PN is required
  - Public Meetings are optional but should be at least 15 days after NOI
- Review and prepare responses to the DEIS comments



# Prepare Final EIS

- FEIS Released for public review
- 30 day review period
- Can identify likely LEDPA, but final determination is made in the ROD
- Corps public notice for permitting is frequently issued in conjunction with the FEIS
- Public may request a public hearing



# Record of Decision

- Includes 404(b)(1) analysis and Public interest review
- LEDPA determined
- Cannot be finalized until 30 days after release of FEIS
- Usually takes 60 to 90 days
- Comments to FEIS must be addressed in ROD
- ROD must identify any special permit conditions
- Recommends issuance, issuance with conditions, or denial
- Permits can be prepared in conjunction with the ROD



# QUESTIONS?



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